

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire evidentiary record filed herein and considering the brief of respondent and the arguments of the parties, the Board finds the ALJ's Award and Nunc Pro Tunc Order should be affirmed.

As a result of the disagreement between the parties at the April 14, 1998 Preliminary Hearing, the ALJ ordered an "independent medical examination by Phillip Mills, M.D." The Judge's Order did not specify whether that examination was to be conducted pursuant to K.S.A. 1996 Supp. 44-510e(a) or K.S.A. 44-516, nor did it specify the purpose of the examination.

Respondent contends that the Preliminary Hearing transcript reflects that the Judge appointed Dr. Mills to perform an independent medical exam for the purpose of determining whether claimant was in need of additional medical treatment. Respondent did not object to the admission of Dr. Mills' report until after claimant's terminal date had passed and the record was closed.

The parties stipulated that claimant suffered a work related injury on February 26, 1997. The nature and extent of claimant's disability was specifically made an issue at the Regular Hearing. The only evidence of claimant's functional impairment "as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment" is the May 5, 1998 IME report by Dr. Mills. K.S.A. 1996 Supp. 44-510e(a). The admissibility of Dr. Mills' report was not made an issue, nor was it discussed, at the Regular Hearing.

Respondent, in its submission letter of January 10, 2000, to the ALJ, did not list the May 5, 1998, independent medical examination report of Dr. Mills as part of the record. Instead, in its submission letter to the ALJ, respondent objected for the first time to the inclusion of Dr. Mills' report, citing K.S.A. 44-519.

As stated, without the report of Dr. Mills, there is no evidence in the record supporting the 5 percent functional impairment to the body as a whole. In fact, without the court ordered IME report there is no evidence concerning the percentage of claimant's permanent impairment, if any, because claimant's counsel took no deposition testimony from any medical expert. It is clear from the record that claimant was examined by several physicians and that the depositions of several physicians were scheduled. But for reasons that are not clear, those depositions were not taken before the terminal dates expired.

The ALJ, in the Award, does not cite either K.S.A. 44-510e(a) or K.S.A. 44-516 as the basis for his ordering an IME by Dr. Mills. But the ALJ specifically mentions his April 14, 1998 Order that an IME be performed by Dr. Mills and relies upon the rating contained in Dr. Mills' report as the basis for his finding of a 5 percent permanent partial general body disability. K.S.A. 1996 Supp. 44-510e(a) provides:

If the employer and the employee are unable to agree upon the employee's functional impairment and if at least two medical opinions based on competent medical evidence disagree as to the percentage of functional impairment, such matter may be referred by the administrative law judge to an independent health care provider who shall be selected by the administrative law judge from a list of health care providers maintained by the director. The health care provider selected by the director pursuant to this section **shall** issue an opinion regarding the employee's functional impairment which **shall** be considered by the administrative law judge in making the final determination. (Emphasis added.)

As the ALJ's order for an IME was entered following a preliminary hearing whereby claimant was seeking additional medical treatment, respondent contends the appointment of Dr. Mills as an independent medical examiner was pursuant to K.S.A. 44-516 (Furse 1993) which states:

In case of a dispute as to the injury, the director, in the director's discretion, or upon request of either party, may employ one or more neutral health care providers, not exceeding three in number, who shall be of good standing and ability. The health care providers shall make such examinations of the injured employee as the director may direct.

K.A.R. 51-9-6 states:

If a neutral physician is appointed, the written report of that neutral physician shall be made a part of the record of hearing. Either party may cross-examine each neutral physician so employed. The fee of the neutral physician giving such testimony shall be assessed as costs to a party at the administrative law judge's discretion.

K.S.A. 44-519 states:

No report of any examination of any employee by a health care provider, as provided for in the workers compensation act and no certificate issued or given by the health care provider making such examination, shall be competent evidence in any proceeding for the determination or collection of compensation unless supported by the testimony of such health care provider, if this testimony is admissible, and shall not be competent evidence in any case where testimony of such health care provider is not admissible.

Respondent failed to make a timely objection to the ALJ's Order and the admission of Dr. Mills' report. To object only after the record is closed precludes claimant the option of taking Dr. Mills' deposition. Nevertheless, because there is the possibility of further appeal, we will address the merits of respondent's objection.

Pursuant to K.S.A. 77-415(4), a regulation has the force of law. There is, however, a conflict between K.A.R. 51-9-6 and K.S.A. 44-519. The administrative regulation allows the report of a neutral physician to be made a part of the record of hearing. When a regulation is in conflict with a statute, the statute must be followed and the regulation disregarded. Lakeview Village, Inc., v. Board of Johnson County Comm'rs, 232 Kan. 711, 659 P.2d 187 (1982). This statutory conflict has also been addressed by the Kansas Court of Appeals on several occasions. The Court of Appeals has ruled that K.S.A. 1996 Supp. 44-510e(a) creates "a narrow exception to the general rules of K.S.A. 44-519." Sims v. Frito Lay, Inc., 23 Kan. App. 2d 591, 933 P.2d 161 (1997); *see also* McKinney v. General Motors Corp., 22 Kan. App. 2d 768, 921 P.2d 257 (1996). The Board has also addressed this conflict, not only in the context of K.S.A. 1996 Supp. 44-510e, but also in dealing with K.S.A. 44-516. In Saxon v. U. S. Home Services, WCAB Docket No. 205,207 (March 2000), the Board found little distinction between a report generated under K.S.A. 1996 Supp. 44-510e and one generated pursuant to K.S.A. 44-516. In applying the Sims and McKinney logic, the Board allowed the independent medical examination report to be admitted without the physician's testimony. *See also* Wiley v. Dillon Companies, Inc., WCAB Docket No 205,235 (March 1999); Haataja v. General Riggers & Erectors, Inc., WCAB Docket No. 173,814 (March 1997).

Here, however, the regulation does not stand alone. K.S.A. 44-516 gives the Director the authority to employ one or more neutral health care providers to make such examination of the injured party as the Director may direct. K.S.A. 1996 Supp. 44-510e allows the ALJ to appoint an independent health care provider when there is a dispute regarding claimant's functional impairment in general body disability disputes. The health care provider, providing an evaluation pursuant to K.S.A. 1996 Supp. 44-510e, shall issue an opinion regarding claimant's "functional impairment," and this opinion "shall be considered by the administrative law judge in making the final determination." In this instance, the ALJ failed to direct Dr. Mills as to the purpose of the examination and, therefore, after determining that claimant had reached maximum medical improvement (MMI) Dr. Mills proceeded to determine claimant's functional impairment.

K.S.A. 1996 Supp. 44-510e mandates that the opinion of the physician be considered for the purpose of functional impairment. The question is whether the ALJ's referral was made pursuant to that statute or whether, instead, the referral was made pursuant to K.S.A. 44-516, or pursuant to both, and whether the exclusions of K.S.A. 44-519 apply.

Here, if the independent medical examination ordered by the ALJ was specifically for the purpose of assessing claimant's functional impairment, under K.S.A. 1996 Supp. 44-510e, there is no question but that this report is part of the record. At the time the IME was ordered there was a dispute as to whether or not claimant had reached MMI. Claimant had been determined to be at MMI and released from further treatment by the authorized treating physician, but claimant was alleging he was in need of additional medical treatment. It is not clear whether the ALJ intended for Dr. Mills to rate claimant's

permanent impairment if he found claimant was not in need of additional medical treatment for the work-related injury. Respondent argues that the IME was not specifically for rating purposes and therefore was pursuant to K.S.A. 44-516 (Furse 1993) and pursuant to the version in effect on the date of accident, that statute did not provide for the report to be considered by the ALJ without the testimony of the physician. However, the 2000 Legislature amended K.S.A. 44-516 to add the following sentence to the statute: "The report of any such health care provider shall be considered by the administrative law judge in making the final determination."

If a statutory amendment is considered procedural, it generally applies retroactively. If, on the other hand, the amendment is substantive, then the law in effect at the time of the injury governs the rights and obligations of the parties. Osborn v. Electric Corp. of Kansas City, 23 Kan. App. 2d 868, 936 P.2d 297, *rev. denied* 262 Kan. 962 (1997). An amendment is considered procedural when it concerns the manner and order of conducting lawsuits--the mode of proceeding to enforce legally recognized rights. Substantive amendments establish rights and duties of parties. Rios v. Board of Public Utilities of Kansas City, 256 Kan. 184, 191, 883 P.2d 1177 (1994).

The amendment in this case merely mandates the health care provider's report to be made a part of the record without changing the rights or obligations of the parties. The amendment is procedural and, thus, applies retroactively to this case.

This view is bolstered by considering the history of K.S.A. 44-516. In 1968, the Kansas Supreme Court decided Garrigues v. Fluor Corporation, Ltd. 201 Kan. 156, 439 P.2d 111 (1968). At that time, K.S.A. 44-516 did not permit an administrative law judge, on his or her own motion, to appoint a neutral health care provider. See L. 1957, ch. 293, § 3. In its decision, the court noted that the statute had been amended in 1927 and 1957, and in neither instance did the legislature provide for the selection of a neutral doctor on the director's (ALJ's) own motion. 201 Kan. at 159.

The following year, K.S.A. 44-516 was amended to allow the finder of fact to employ a neutral health care provider on its own motion. See L. 1969, ch. 246, § 2. If the legislature believed there was a need to allow the ALJ to employ a neutral health care provider, the legislature certainly contemplated that the ALJ would consider the doctor's findings. Under respondent's interpretation of K.S.A. 44-516, the ALJ would be wasting his or her time in procuring a neutral report which the ALJ could not read unless the parties decided to depose the expert.

The Board finds there is no distinction between the admissibility of an IME report ordered under K.S.A. 44-516 and one ordered under K.S.A. 1996 Supp. 44-510e. Therefore, the ALJ did not err by considering the report of Dr. Mills. As to whether Judge Clark intended that Dr. Mills provide a permanent impairment rating if he found claimant to be at MMI, the Board believes that Judge Clark was in the best position to know the

answer to that question and Judge Clark answered it by considering the rating in his Award.

The Board affirms the ALJ's finding that claimant is entitled to a 5 percent permanent partial general body disability.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award dated July 19, 2000, and Nunc Pro Tunc Order dated August 3, 2000, entered by Administrative Law Judge John D. Clark should be, and are hereby, affirmed. Future medical compensation is to be allowed only after proper application to and approval by the Director.

IT IS SO ORDERED.

Dated this ____ day of March 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

We respectfully dissent from the majority decision that the report of Dr. Mills may be considered in this case. The majority finds that respondent failed to make a timely objection to the admission of the report, pursuant to K.S.A. 44-519, until after the terminal dates had expired. The majority further notes that the Administrative Law Judge did not specify whether the independent medical examination was to be conducted pursuant to K.S.A. 1996 Supp. 44-510e(a) or K.S.A. 44-516. However, it is clear that the independent medical examination was ordered at the preliminary hearing.

K.A.R. 51-3-5a provides in pertinent part:

Medical reports or any other records or statements shall be considered by the administrative law judge at the preliminary hearing. However, the reports shall not be considered as evidence when the administrative law judge makes a final award in the case, unless all parties stipulate to the reports, records, or statements or unless the report, record, or statement is later supported by the testimony of the physician, surgeon, or other person making the report, record, or statement.

In Roberts v. J.C. Penney Co., 263 Kan. 270, 949 P.2d 613 (1997), the Supreme Court concluded that the above quoted regulation preserved the specific requirement that K.S.A. 44-519 must be followed as written.

As noted by the majority, the regular hearing transcript contains no stipulation to the admission of Dr. Mills' report nor was the report supported by Dr. Mills' testimony. Pursuant to K.S.A. 44-519 and K.A.R. 51-3-5a, the report of Dr. Mills, ordered and provided for preliminary hearing purposes, could not be considered by the administrative law judge at the final hearing. An objection was unnecessary because the statute and regulation precluded consideration of the report.

The majority next relies on the language in K.S.A. 1996 Supp. 44-510e(a) which provides an exception to the prohibition of K.S.A. 44-519 and allows consideration of an ordered independent medical opinion regarding the employee's *functional impairment*.

At the time of the referral to Dr. Mills this case was not in a posture for a request for a functional impairment rating pursuant to K.S.A. 1996 Supp. 44-510e(a). A preliminary hearing is summary in nature and after an initial finding that the case is compensable the only two issues to address are entitlement to medical compensation and temporary total disability compensation. K.S.A. 44-534a(a)(2). Therefore, the only issues that were relevant to the ordered independent medical examination were whether the claimant needed additional medical treatment or whether the claimant was temporarily totally disabled. A request for a functional impairment rating would have been premature. The independent medical examination was therefore ordered pursuant to K.S.A. 44-516 (Furse 1993).

The majority next determines that there is little distinction between a report generated under K.S.A. 1996 Supp. 44-510e(a) and one generated pursuant to K.S.A. 44-516. In addition, the majority notes that the 2000 Legislature amended K.S.A. 44-516 to include language permitting consideration of the report by the administrative law judge in making the final determination.

The specific language in K.S.A. 44-510e(a) that allows the independent medical examination report to be considered without the supporting testimony of the examiner is a narrow exception to the provisions of K.S.A. 44-519. Sims v. Frito Lay, Inc., 23 Kan. App. 2d 591, 933 P.2d 161 (1997). That same specific language creating the narrow

exception to the provisions of K.S.A. 44-519 was absent from K.S.A. 44-516 until July 1, 2000.

In workers compensation cases, the law in effect at the time of the injury governs the rights and obligations of the parties. Osborn v. Electric Corp. of Kansas City, 23 Kan. App. 2d 868, 936 P.2d 297, *rev. denied* 262 Kan. 962 (1997). When the legislature revises an existing law, it is presumed that the legislature intended to change the law as it existed prior to the amendment. Hughes v. Inland Container Corp., 247 Kan. 407, 414, 799 P.2d 1011 (1990). Prior to the amendment of K.S.A. 44-516, either the claimant or the respondent could object, pursuant to K.S.A. 44-519, to the introduction of a health care provider's report not supported by the testimony of such health care provider. Here, as in Osborn, retroactive application of the amendment to K.S.A. 44-516 would affect that vested right of defense.

The history of K.S.A. 44-516 that the majority details to bolster its opinion refers to a statutory amendment in 1969 as support for the proposition the legislature would not provide for an administrative law judge to be able to refer for an independent medical examination and then to be able to rely on the report without a party taking the deposition. Although it may indeed have been illogical, nonetheless, in the intervening years after 1969 the provisions of K.S.A. 44-519 prevailed and the actual workers compensation practice and procedure was that such report had to be supported by the testimony of the examiner unless the parties agreed to its admission as part of the record.

For the foregoing reasons the report of Dr. Mills should not have been considered in this case.

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